Nos. 2209, 2210, and 2211.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Appellant,
vs.
William F. Kettenbach, George H. Kester, Clarence W. Robnett, William Dwyer, and Frank W. Kettenbach, Appellees.

No. 2209

THE UNITED STATES OF AMERICA,
Appellant,
vs.
William F. Kettenbach, George H. Kester, Clarence W. Robnett, William Dwyer, The Idaho Trust Company, a Corporation, The Lewiston National Bank, a Corporation, The Clearwater Timber Company, a Corporation, Elizabeth W. Thatcher, Curtis Thatcher, Elizabeth White, Edna P. Kester, Elizabeth Kettenbach, Martha E. Hallett, and Kitty E. Dwyer, Appellees.

No. 2210

THE UNITED STATES OF AMERICA,
Appellant,
vs.
William F. Kettenbach, George H. Kester, and William Dwyer, Appellees.

No. 2211

Brief for Frank W. Kettenbach, Appellee in No. 2209 and for Clearwater Timber Company, Idaho Trust Company, and Lewiston National Bank and Potlatch Lumber Company, Appellees in No. 2210.

JAMES E. BABB,
Lewiston, Idaho,
Solicitor for said Appellees.
PEYTON GORDON,
Solicitor for Appellant.

Appeals from the District Court of the United States for the District of Idaho, Central Division.

Nos. 2209, 2210, and 2211.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Appellant, No. 2209

vs.

William F. Kettenbach, George H. Kester, Clarence W. Robnett, William Dwyer, and Frank W. Kettenbach, Appellees.

THE UNITED STATES OF AMERICA,
Appellant, No. 2210

vs.

William F. Kettenbach, George H. Kester, Clarence W. Robnett, William Dwyer, The Idaho Trust Company, a Corporation, The Lewiston National Bank, a Corporation, The Clearwater Timber Company, a Corporation, Elizabeth W. Thatcher, Curtis Thatcher, Elizabeth White, Edna P. Kester, Elizabeth Kettenbach, Martha E. Hallett, and Kitty E. Dwyer, Appellees.

THE UNITED STATES OF AMERICA,
Appellant, No. 2211

vs.

William F. Kettenbach, George H. Kester, and William Dwyer, Appellees.

Brief for Frank W. Kettenbach, Appellee in No. 2209 and for Clearwater Timber Company, Idaho Trust Company, and Lewiston National Bank and Potlatch Lumber Company, Appellees in No. 2210.

JAMES E. BABB,
Lewiston, Idaho,
Solicitor for said Appellees.
PEYTON GORDON,
Solicitor for Appellant.

Appeals from the Distrirt Court of the United States for the District of Idaho, Central Division.

A.

Laches, Estoppel, and misleading conduct of complainant and diligence and good faith of defendants.

VII.

Purchaser by a quitclaim deed.

VIII.

A present advance is a sufficient consideration for security given for the present advance and the prior debt, to constitute the security-holder a bona fide purchaser as to both.

IX.

Complainants misconceptions touching the absolute deeds to secure payment of money.

Nos. 2209, 2210, and 2211.

UNITED STATES CIRCUIT COURT OF APPEALS

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Appellees.

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William F. Kettenbach, George H. Kester, Clarence W. Robnett, William Dwyer, The Idaho Trust Company, a Corporation, The Lewiston National Bank, a Corporation, The Clearwater Timber Company, a Corporation, Elizabeth W. Thatcher, Curtis Thatcher, Elizabeth White, Edna P. Kester, Elizabeth Kettenbach, Martha E. Hallett, and Kitty E. Dwyer,
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THE UNITED STATES OF AMERICA,
Appellant,
vs. No. 2211
William F. Kettenbach, George H. Kester, and William Dwyer,
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Brief for Frank W. Kettenbach, Appellee in No. 2209 and for Clearwater Timber Company, Idaho Trust Company, and Lewiston National Bank and Potlatch Lumber Company, Appellees in No. 2210.

GENERAL STATEMENT.

I.

The defendant F. W. Kettenbach, No. 388, had no interest in any of the property, and filed an answer and disclaimer (Vol. 12, p. 97). The defendant Potlatch Lumber Company (Answer Vol. 12, p. 4337), and Clearwater Timber Company (Answer Vol. 12, p. 4366), No. 406, had acquired by purchase in the ordinary course of business, a few of the claims in question, and they have answered, setting up their position as bona fide purchasers without notice. Appellant having made no assignments (Vol. 12, p. 4545) against the finding of the bona fides of the purchases made by Potlatch Lumber Company, and no citation having been addressed to it (Vol. 12, p. 4565), no further attention to their interests is necessary. The Idaho Trust Company (Answer Vol 12, p. 4355), and Lewiston National Bank (Answer Vol. 12, p. 4323), defendants in No. 406 (No. 2210 here), acquired a lien on portions of the property in question to secure the payment of money, and have filed answer setting forth that they acquired such liens in good faith and without notice of illegality. The defendant Lewiston National Bank also acquired title to a few claims, same having been taken for indebtedness, and has in its answer set forth that it

acquired title to these claims in good faith for value without notice.

The first complaint filed in any of these cases was that in No. 388, filed October 14, 1907 (Vol. 1, pp. 3-29), and the Lis Pendens was filed in the action October 16, 1907 (Vol. 4, pp. 1463-68). All of the bona fide purchases and bona fide liens acquired and relied upon by these defendants were acquired before the date of the commencement of any of these suits. The complaints in Nos. 406 (No. 2210 here) and 407 were not filed until the 4th of September, 1909 (Vol 12, pp. 4225, and Vol. 13, pp. 4575), practically two years after the filing of complaint in No. 388, which, even, was filed after the closing of all of the transfers which are claimed to have been made bona fide and for value by these defendants.

The complaint in No. 388 attacked the validity of fifty-four separate patents (see pages 10 to 16 of original complaint) (Vol. 1, pp. 3-29); the complaint in this case was amended May 22, 1909, by striking out thirty-seven of the fifty-four patents attacked in the original complaint (Vol. 1, pp. 50-86). These were stricken out on the 22nd day of May, 1909, at the time of the filing of the amended complaint, which left out these thirty-seven patents of the fifty-

four which had been attacked in the original complaint (Vol. 1, pp. 50-86).

On the 4th day of September, 1909, the Government changed its mind with reference to portions of these claims stricken out, and abandoned, and filed a ne wsuit, No. 406 (No. 2210 here), equity, in which it included again a large portion of those patents which had been stricken out by amendment (Vol 12, p. 4225), but left out permanently and abandoned totally the attack of patents of Henderson H. Disney, H. S. Palmer, George W. Herrington, Robert N. Wright, Maud N. Wright, John W. Killinger, and George H. Kester, and added the patents to the following persons, which had not been previously attacked: Cornell, Lambdin, and Shaeffer (these claims sold to Potlatch Lumber Company, whose title is *now* conceded as above stated), and later, by amendment, the patent to Robert Waldman was added March 8, 1910 (Vol. 12, p. 4414. An additional complaint, No. 407, was filed September 4, 1909 (Vol. 13, p. 4575), and it included patents to the following persons, which had not been previously attacked: Charles A. Meyers, Jennie Myers, Mary A. Loney, Charles E. Loney, Mary Jolly, James T. Jolly, K. E. Perkins, and F. J. Bonney.

The patents to properties in which these purchasers became interested were all issued between the 20th of November, 1902, and the 31st of December, 1904. These patents were allowed to stand of record evidencing good and ample titles to the general public without any question on the part of the Government until the 14th day of October, 1907, and the attack then made was very largely cleared of record by amendment of complaint made the 22nd of May, 1909, after two years, without, we might say, any steps taken on the part of the Government to show its confidence in the attack it had made, in the complaint which it had filed in October, 1907.

The delay in proceeding on the part of the Government is the more significant when it is considered that the Government had procured indictments affecting some of the entries as early as July 13, 1905 (Vol. 11, p. 4009), and must therefore have been in possession of information for a considerable time prior to the 13th of July, 1905. All these indictments have now been either dismissed or verdicts of "not guilty" rendered thereon, so that it stands confessed of record, so far as the criminal side of the Court is concerned, that there has been no criminality in connection with any of these entries. This fact may shed some light, doubtless, sheds, considerable light,

on the cause of delay in the commencement of attack on the civil side of the Court, and the vacillation characterizing same by dismissal and re-making of charges.

The attorney for these lien and title claimants, on whose behalf this brief is submitted, as well as Frank W. Kettenbach, one of the defendants who disclaims any interest in the property, has not deemed it necessary to take any particular interest in the issues pending between the Government and the original entrymen or alleged co-conspirators with the original entrymen. These defendants have left the evidence upon that feature of the case for presentation by the original entrymen and the alleged co-conspirators, and will also leave the discussion of that feature of the case to the attorneys representing those parties.

These defendants in their answers simply put the Government upon proof as to those matters and alleged the bona fide purchases and incumbrances and offered proof in support thereof.

Counsel for these defendants, however, attended a few of the sessions, and listened to a few different branches of the testimony of the entrymen and others, for the purpose of getting a fair conception of the nature of the issues between the Government

and the entrymen and their alleged co-conspirators. From the impressions derived from the testimony given at these hearings, especially when coupled with the fact that the issues now submitted on the civil side were submitted o nthe criminal side (Indictments 605, 607, 615, Vol 11, pp. 3982-4005), to a jury of twelve men who returned a verdict of "not guilty" (Vol. 11. p. 4180). Counsel for these defendants holds a decided impression that the case of the Government on these issues even if not concluded by the verdict rendered in the criminal case, is wholly defeated by the doctrine that in this class of cases to justify a decree for complainant the evidence in the case must make a case for complainant that is entirely satisfactory to the chancellor and as expressed in many of the authorites makes out a case beyond a reasonable doubt. Counsel for these defendants has tried a number of cases dependent upon these principles, and from the impression derived in this class of cases is unable to admit that the record in this case is entirely satisfactory in favor of complainant, to the conscience or the mind of the chancellor in any view that can be taken of it. What is meant by being entirely satisfactory and by being established beyond a reasonable doubt? For the mind and conscience to be satisfied, all questions, misgiving and

hesitations, in the chancellor's mind and conscience must be silenced. Until this is done, the mind and conscience is not satisfied. The case must be such, that when it is decided by the chancellor, it is done without a hesitation, or a reasonable doubt, or question, and when it is done, it must have been so satisfactorily done, that no reasonable doubt of it will ever return to the mind or conscience. This is precisely the form of argument which was submitted for these defendants to the Supreme Court of Idaho in Rice vs. Rigley, 7 Idaho, page 127, when the Court, reversing a judgment granted below for the complainant, decreed:

> "As to the law of the case, counsel for appellants contends that, as respondents are seeking to hold the appellants as trustees of an undivided one-half of said mining claims, and to enforce the specific performance of an alleged prospector's or grubstake contract, respondents cannot have a decree upon a bare preponderance of the evidence, and that they are not entitled to a decree unless their case has been clearly and satisfactorily proven, and all doubts cleared up; while counsel for respondents contend that in this class of cases the rule is well established that a mere preponderance of the evidence is all that is required. The trial court held that a preponderance of evidence was all that was necessary to establish plaintiff's case. Counsel for appellants cite and quote from a large number of authorities in support of their contention. Counsel for respondents contend

that nearly every case cited by appellants was an action to reform a written deed or instrument, or to have a trust declared contrary to the specific terms of a written instrument, and are not applicable to the case at bar. Counsel, however, concede that the cases of Proudfoot vs. Wightman, 78 Ill. 556, and Dewey vs. Land Co., 98 Wis. 83, 73 N. W. 536, require explanation, and those cases are explained by counsel by suggesting that the decisions in those cases are "simply the opinion of the court as to what the rule ought to be." We think, however, the correct rule is stated in those cases After a most thorough examination of this question, and of the authorities cited, we conclude that the rule is well settled in a case like the one at bar, that something more than a bare preponderance of the evidence is required to entitle the plaintiffs to a decree declaring a resulting trust and for specific performance. In the first case above cited the court says: 'In any ordinary chancery case a complainant is required to establish the allegations of the bill by a preponderance of the evidence, but in a case of this character * * * something more than a bare preponderance should be required.' In Dewey vs. Land Co., supra (which was a case to enforce specific performance of an oral agreement to convey land), it is said: "Specific performance is not a matter of strict right, but rests in the sound discretion of the court, and the contract sought to be enforced must be fully and clearly proved in all its parts. A mere preponderance of evidence is not sufficient.' It is held in Printup vs. Mitchell, 17 Ga. 567, that a parol contract for land, like the reformation of a deed by parol proof, should be made out so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the

agreement. In Johnson vs. Quarles, 46 Mo. 423, the plaintiff attempted to establish a resulting trust in land, and the court used the following language as to the evidence introduced, to-wit: 'While admitting such evidence for the purpose of creating this resulting trust, the chancellor has always required that it be clear and unequivocal.' 'The insecurity of titles, and the temptation to perjury, among the chief reasons demanding that contracts affecting lands should be made in writing, also imperatively require that trusts arising by operation of law should not be declared upon any doubtful evidence, or ever upon a mere preponderance of evidence. There should be no room for a reasonable doubt as to the facts relied upon.' (See, also, Ringo vs. Richardson, 53 Mo. 385; Barbour vs. Barbour, 51 N. J. Eq. 271, 29 Atl. 148; Association vs. Brewster, 51 Tex. 263; 2 Pomeroy's Equity Jurisprudence, Sec. 1040.) As to the evidence necessary to establish a resulting trust in land, the court, in Reynolds vs. Caldwell, 80 Ala. 232, said: 'The rule is that a trust of this nature, sought to be ingrafted upon lands by parol evidence, and such as result by operation of law must be supported by testimony not only entirely satisfactory, but clear and undoubted,' * * * 'the evidence must be satisfactory, clear and convincing. It must be so clear and certain as to leave no well-founded doubt in the mind of the court. The evidence of the respondents, when tested by that rule, will not entitle them to a decree."

This case is still approved by the Supreme Court of Idaho, (see 152 Idaho 391-2, also 582), and corresponds with the many Federal decisions cited and

amply quoted from in the brief being submitted in this cause for the principal defendants. But it should not be overlooked that in the Maxwell Land Grant case, 121 U. S. 325, the court said this doctrine was applicable with added force and energy in a suit to set aside a patent to lands.

If this were an ordinary case the foregoing doctrine would dispose of it. The case is extraordinary in a court of equity, especially in this kind of a case, in that complaint in a court of equity presents a case where such proof is required, basing it upon the testimony of an unquestioned and unrepentant embezzler and perjurer (Opinion of Dietrich, J., Vol. 1, pp. 258-266). More than that, this witness had before his embezzlement, testified the other way and after arrest for embezzlement, went to the Government, admitting that he hoped for advantage thereby, but still more, after the Government representative in this case, in equity,—faced the court and gave an assurance of having no knowledge of any promise of immunity, the witness plead guilty to embezzlement of over 100,000 dollars and was was promptly pardoned by the President, evidencing, as Judge Dietrich asserts, a prearranged immunity (Vol. 1, p. 264) which, even if not communicated to the Government's attorney in this case,

would operate to impose upon the court or conceal frim the court knowledge of the immunity arrangement. No representative of the Government has, under oath, denied as a witness in this case the contract for immunity. Has a complainant ever gained standing in a court of equity, in this kind of a case, on such testimony, presented under such circumstances of concealment and lack of good faith? The Government's representatives, weighted down with the customs of the criminal court ,where the Government may make a contract for testimony, promising an embezzler his liberty therefor, have apparently without realizing what they have done, brought such a witness, under such circumstances, to the support of a complainant in a court of equity. While such an agreement is within the power of a prosecutor in a criminal court, in a court of equity—or even of law, on its civil side, such an arrangement is a high crime, and there is as much evidence that such an arrangement was made for use in this case, as there is of many of the charges the Government is making in this case. The issues thereatfer being decided against the Government by verdict in criminal cases have been decided by the court below, after seeing the witnesses, so that whatever the views of this court, the issue could not be considered as

clearly or satisfactorily established for the Government. In such a case this court declared the well settled rule October 7, 1912, in the Vanderbilt vs. Bishop, 199 Fed. 420 as follows:

> "Findings of the trial judge in an equity suit, based on the evidence of witnesses before him and resulting in a substantial conflict, with respect to the material issues, will not be set aside on appeal."

II.

F. W. KETTENBACH.

Defendant, F. W. Kettenbach, in No. 388 filed an answer and disclaimer.

The evidence shows that F. W. Kettenbach had no connection of any nature with any of the patents or the titles evidenced thereby attacked in the amended complaint in No. 388. Furthermore, it is conceded, and the evidence discloses, that F. W. Kettenbach was in no way connected with George H. Kester, William F. Kettenbach, William Dwyer and Clarence W. Robnett in any of their timber land investments or enterprises. See testimony of C. W. Robnett on cross-examination by James E. Babb, last half of pages 2343-2345, where in part he testified as follows:

> "Q. He wasn't a party to any of these business transactions, was he?
>
> A. Not to my knowledge, in regards to the boys' timber at that time.
>
> Q. He wasn't interested in securing timber?
>
> A. I don't know as he was; he wasn't at least working with the boys in regards to their claims.
>
> Q. You never had any dealings with him in regard to timebr locations, and securing title to timber lands?
>
> A. No, I did not.
>
> Q. Not a bit, did you?
>
> A. Not to my recollection.

Q. You knew he wasn't in business, didn't you?

A. Why, he wasn't in a way, but he was at the time that he took those two claims.

Q. What business was it?

A. Buying the tie timber; he was furnishing some tie contracts to the railroads and I didn't know but what he had an interest.

Q. Which one of these claims did he have an interest in?

A. He had no interest as far as having an interest in those things, but you said about having to do with the timber.

Q. He had no interest in anything you testified about, did he?

A. Not until the time he took them over for the bank.

Q. I am talking about a personal interest; he didn't have any interest in any claims you have been testifying about?

A. Not to my knowledge.

Q. He didn't loan any money even for any of the boys?

A. I don't personally know what he did.

Q. *Just name one where he had an interest?*

A. I don't know as I can recall any one at the present time.

Q. Then you don't know of any claim where he loaned money or had any interest of any nature, do you?

A. Well, not from him, I don't.

Q. *Do you know of any, the question is do you know of any such claims in which he had an interest, or for the securing of which he loaned any money?*

A. Personally, I do not.

William Haevernick and Alma Haevernick, husband and wife, each acquired a timber claim. They, at least William Haevernick, was interested with Mr. Frank W. Kettenbach in the Orofino Trading company, a corporation of Orofino, Idaho, and they became indebted to Mr. F. W. Kettenbach and sold him their two timber claims. This indebtedness was wiped out in the transaction. Neither Kester, nor Dwyer, nor W. F. Kettenbach, had any connection with the Orofino Trading Company, or with the Haevernicks, or with their timber claims, and there is nothing in connection with these claims that makes any of the evidence about them relevant under the charge in the complaint of conspiracy between W. F. Kettenbach, Kester, Dwyer, and Robnett. Mr. F. W. Kettenbach after acquiring these Haevernick claims sold them to the Clearwater Timber Company, as will appear more fully later on. The testimony of the Haevernicks appears in Vol. 2, pp. 470-489, and clearly shows that their claims were taken up of their own motion and without any arrangement with Mr. F. W. Kettenbach, or anyone else. There is no evidence of illegality in connection with same, and he had disposed of them to the Clearwater Timber Company by deed recorded July 13, 1907, before the first complaint was filed in No. 388 (Vol. 11,

pp. 4104-5), and his disclaimer therefore should be sustained and the decree dismissing the cause is correct as to him. Judge Dietrich found no evidence even of the illegality of either of those entries (Vol. 1, pp. 283-4). The Government has offered in evidence an anonymous Campaign Circular circulated in a political campaign in 1904 (Vol. 11, pp. 4020-4026), in which this litigation had its origin, also newspaper publications in support of the same propaganda (Vol. 11, p. 4627)) and affidavit of Frank W. Kettenbach (Vol. 11, pp. 4042-4060). After seeing from the evidence in this case that Frank W. Kettenbach had nothing to do with any of these land transactions, note the moral character of those supporting it including the Government representatives who would cause publication of Frank W. Kettenbach at all times, including even his picture as one of the land fraud "Trio" (Vol. 11, pp. 4023, 4053 and 4057). and Vol. 10, p. 3603. The representative of the paper printing those falsehoods was not on speaking terms with F. W. Kettenbach and was the constant companion of the Government Special Agents, Robnett was in the hands of those parties all the time. The Court cannot properly weigh the testimony and methods used wtihout consideration of all those circumstances.

III.

POTLATCH LUMBER COMPANY.

The Potlatch Lumber Company is defendant in No. 406. It acquired the claims of Lambdin, Cornell, and Shaeffer, and is alleged in the complaint to have acquired the same with notice of alleged illegality in obtaining patents thereto. The evidence as to its purchases is Wm. Deary Vol. 9 pp. 3521-3537, Vol. 11, pp. 4115 and 4116, and 4202 and 3 and Vol. 10, pp. 3692-93 Vol. 5. The Government in the court below abandoned its contest against Potlatch Lumber Company.

The Court having found that this Company was a bona fide purchaser and no citation having been issued to or served upon them and no assignment of error having been made against such finding, there is nothing requiring any further consideration thereof and any action in this court cannot operate to reverse the finding in their favor below.

IV.

CLEARWATER TIMBER COMPANY.

Clearwater Timber Company, prior to the commencement of any of these suits, acquired title for valuable consideration in the ordinary course of Business and without any notice of illegality, to the claims patented to *William B. Benton, Joel H. Benton, Pearl Washburn, William Haevernick, Alma Haevernick* and *Geary VanArtsdalen.* All of these claims were purchased and deeds recorded long before the filing of any suit by the Government, and after the patents had been resting uncontested on the public records from three to five years while the transferees had, in various instances as shown by the public records, been transacting business with other bona fide mortgagees and transferees. The following is a complete chain of the title to these claims as shown at Vol. 4, pp. 1477-1481, 1489-1490 (and Vol. 12, pp. 4258 and 4259), 1512-1515.

WILLIAM B. BENTON, T. & S. 4054.

Description: S 1-2 NW 1-4, N 1-2 SW 1-4, Sec. 15, T. 39 N., R. 3 E., B. M.

THE UNITED STATES
to
WILLIAM B. BENTON

RECEIVER'S RECEIPT.

Dated Nov. 21, 1902.
Recorded April 27, 1903, Book D-2, p. 131, Nez Perce County, at request of Shoshone Abstract Co.

WILLIAM B. BENTON
to
C. W. ROBNETT.

DEED.

Consideration, $1600.00.
Dated Jan. .., 1902.
Acknowledged Jan. 10, 1903, before Otto Kettenbach, N. P., Nez Perce County, Idaho.
Recorded April 27, 1903, Book 83 1-2, p. 87, Nez Perce County, at request of Shoshone Abstract Co.
Witness: Otto Kettenbach, E. C. Smith.

CLARENCE W. ROBNETT, and
JENNIE M. ROBNETT, Wife,
to
O. E. GUERNSEY, Dubuque, Iowa.

Mortgage, $125.00.
Dated March 15, 1904.
Acknowledged March 15, 1904, before Jno. E. Nickerson, N. P., Nez Perce County, Idaho.
Recorded March 21, 1904, Book 76, p. 532, Nez Perce County, at request of Shoshone Abstract Co.
Released in Book 57, p. 364; Book 59, p. 392.

UNITED STATES
to
WILLIAM B. BENTON — PATENT

Dated Feby. 25, 1904.
Recorded May 9, 1906, Book 38, p. 111, Nez Perce County, at request Lewiston Abstract Co. Delivered to Lewiston Abstract Co.

UNITED STATES
vs.
WILLIAM K. KETTENBACH, et al — LIS PENDENS

Recorded Oct. 16, 1907, Book 1, p. 211, records of Nez Perce County, Idaho, request U. S. Attorney. Description same as above and other property.

C. W. ROBNETT and
JENNIE M. ROBNETT, Wife,
to
ELIZABETH WHITE. — DEED.

Consideration, $1.00.
Dated July 8, 1907.
Acknowledged July 8, 1907, before C. H. Lingenfelter, N. P., Nez Perce County, Idaho.
Recorded July 8, 1907, Book 93, p. 490, Nez Perce County, Idaho, at request of Lewiston Abstract Co. and delivered to Lewiston Abstract Co.
Witnesses: Mamie Eichenberger, C. H. Lingenfelter.
Description same as above and other property.

ELIZABETH WHITE, Widow,
to
CLEARWATER TIMBER COMPANY,
a Corporation.
Warranty Deed, $1250.00
Dated Sept. 4, 1907.
Acknowledged Sept. 4, 1907, before John D. McConkey, N. P., Nez Perce County, Idaho.
Recorded Sept. 16, 1907, Book 94, p. 57, at request of F. J. Davies.
Description same as above and other property.
Witnesses: J. D. McConkey and J. F. Pickering.

JOEL H. BENTON, T. & S. No. 4055.

Description: S 1-2 SW 1-4, S 1-2 SE 1-4, Sec. 15, T. 39 N. R. 3 E. B. M.

UNITED STATES
to RECEIVER'S RECEIPT
JOEL H. BENTON,
Dated November 21, 1902.
Recorded April 27, 1903, in Book D-2, p. 131, at request of Shoshone Abstract Co.

JOEL H. BENTON, and
LIDA ALICE BENTON, Wife,
to DEED.
C. W. ROBNETT,
Consideration, $1600.00.
Dated December 29, 1902: acknowledged December 29, 1902, before Otto Kettenbach, N. P., Nez Perce County, Idaho.
Recorded April 27, 1903, Book 83 1-2, p. 88, Nez Perce County, at request of Shoshone Abstract Co.
Description same as above.
Witness: Otto Kettenbach

UNITED STATES
to PATENT
JOEL H. BENTON,

Dated February 25, 1905.
Recorded May 9, 1906, in Book 38, p. 112, Nez Perce County, at request of Lewiston Abstract Co.
Description same as above.

C. W. ROBNETT and
JENNIE M. ROBNETT, Wife,
to DEED.
ELIZABETH WHITE,

Consideration, $1.00.
Dated July 8, 1907; acknowledged July 8, 1907, before C. H. Lingenfelter, N. P., Nez Perce County, Idaho.
Recorded July 8, 1907, Book 93, p. 480, Nez Perce County, at request Lewiston Abstract Co.
Description same as above.
Witnesses: Minnie Eichenberger, C. H. Lingenfelter.

ELIZABTEH WHITE, Widow,
to WARRANTY DEED.
CLEARWATER TIMBER COMPANY,
Corp. of State of Washington.

Con. $1600.00.
Dated Sept. 4, 1907; acknowledged Sept. 4, 1907, before John D. McConkey, N. P., Nez Perce County, Idaho.
Recorded Sept. 16, 1907, Book 94, p. 58, Nez Perce County, at request of T. J. Davies.
Delivered to T. J. Davies.
Witnesses: J. D. McConkey, J. F. Pickering.

UNITED STATES
vs. LIS PENDENS
WILLIAM F. KETTENBACH, et al.

Recorded Oct. 16, 1907. Book 1, p. 211, Nez Perce County.
Description same as above and other property.

PEARL WASHBURN, T. & S. No. 4306.

Description: E 1-2 SE 1-4, SE 1-4 NE 1-4 Sec. 27, T. 40 N., R. 4 E., B. M.

UNITED STATES
to RECEIVER'S RECEIPT.
PEARL WASHBURN.

Dated April 16, 1903.
Recorded April 18, 1903, Book B-2, p. 131, at request of W. F. Kettenbach.

PEARL WASHBURN and
CHARLES O. WASHBURN, Husband,
to Mortgage, $400.00
W. F. KETTENBACH.

Dated April 16, 1903.
Acknowledged April 16, 1903, before H. K. Barnett, N. P., Nez Perce County, Idaho.
Recorded April 18, 1903, Book 76, p. 420, at request of W. F. Kettenbach.
Released June 5, 1907, Book 59, p. 351.

PEARL WASHBURN and
CHARLES O. WASHBURN, Husband,
to DEED.
JAMES B. McGRANE.

Consideration, $900.00.
Dated May 23, 1906.
Acknowledged Oct. 31, 1906, before J. H. Smith, N. P., Los Angeles, Cal., and before A. W. Ewing, N. P., Los Angeles, Cal.
Recorded Nov. 9, 1906, Book 89, p. 496, at request J. B. McGrane.
Delivered to J. B. McGrane.

UNITED STATES
to PATENT
PEARL WASHBURN.

Dated July 2, 1904.
Recorded May 6, 1907, Book 38, p. 316, at request Lewiston Abstract Company, and delivered to Lewiston Abstract Co.

PEARL WASHBURN and
CHARLES O. WASHBURN, Husband,
to Quit Claim Deed.
JAMES B. McGRANE.

Consideration, $1.00.
Dated May 31, 1907.
Acknowledged May 31, 1907, before J. H. Smith, N. P., Los Angeles, Cal.
Recorded June 6, 1907, Book 86, p. 300, at request Lewiston Abstract Co., and delivered to Lewiston Abstract Co.

JAMES B. McGRANE and
EDNA McGRANE, Wife,
to
JOHN E. CHAPMAN. DEED.

Consideration, $7,500.00.
Dated May 8, 1907.
Acknowledged May 8, 1907, before Chas. L. McDonald, N. P., Nez Perce County, Idaho.
Recorded June 6, 1907, Book 93, p. 421, at request Lewiston Abstract Co.
Above described land and other property.

JOHN E. CHAPMAN, Single,
to Warranty Deed
CLEARWATER TIMBER COMPANY.,
a Corporation.

Consideration, $8,650.00
Dated June 7, 1907.
Acknowledged June 7, 1907, before Chas. L. McDonald, N. P., Nez Perce County, Idaho.
Recorded June 21, 1907, Book 88, p. 579, at request of F. J. Davies, and delivered to F. J. Davies.
Above described land and other property.

UNITED STATES
vs. LIS PENDENS
WILLIAM F. KETTENBACH, et al.

Recorded Oct. 16, 1907, Book 1, p. 211.

WILLIAM HAEVERNICK, T. & S. No. 4635
ALMA HAEVERNICK, T. & S. No. 4636.

Description: SE 1-4 SE 1-4 Sec. 23, NE 1-4 NE 1-4 Sec. 26, T. 37 N., R. 2 E., B. M. SW 1-4 NE 1-4 Sec. 26, T. 37 N., R. 2 E., B. M.

THE UNITED STATES to
WILLIAM HAEVERNICK

THE UNITED STATES to
ALMA HAEVERNICK.

Patent Dated Nov. .., 1904.

WILLIAM HAEVERNICK and
ALMA HAEVERNICK,
to Warranty Deed.
FRANK W. KETTENBACH.
Consideration, $650.00.
Dated June 3, 1904.
Acknowledged June 14, 1907, before Ray C. Hyke, N. P., Nez Perce County, Idaho.
Recorded June 14, 1907, Book 88, p. 574, at request Lewiston Abstract Co.
Delivered to Lewiston Abstract Co.

FRANK W. KETTENBACH and
AMY D. KETTENBACH,
to Warranty Deed.
CLEARWATER TIMBER CO.
Consideration, $800.00.
Dated June 12, 1907.
Acknowledged June 14, 1907, before Ray C. Hyke, N. P., Nez Perce County, Idaho.
Recorded July 13, 1907, Book 88, p. 607, at request F. J. Davies.

UNITED STATES
vs. LIS PENDENS.
WILLIAM F. KETTENBACH, et al.

Recorded Oct. 16, 1907, Book 1, p. 211.
Description: SE 1-4 SE 1-4 Sec. 23; NE 1-4 NE 1-4 Sec. 26, T. 37 N., R. 2 E., B. M.

GEARY VAN ARTSDALEN, T. & S. No. 4641.
Description; NE 1-4 Sec. 25, T. 37 N., R. 5 E., B. M.

UNITED STATES
to PATENT
GEARY VAN ARTSDALEN.

Dated November 1, 1904.
Recorded Dec. 13, 1904, Book 55, p. 382, at request J. C. Jansen.

GEARY VAN ARTSDALEN, Single,
to Warranty Deed.
CLEARWATER TIMBER CO.
(Corp. of St. Paul, Minn.).

Consideration, $800.00.
Dated December 2, 1905.
Acknowledged December 13, 1905, before Fred Judd, J. P., Nez Perce County, Idaho.
Recorded Dec. 23, 1905, Book 81, p. 399, at request T. J. Davis, and delivered to T. J. Davis.
Witnesses: Fred H. Judd and Mrs. Clarence Judd.

UNITED STATES
vs. LIS PENDENS.
WILLIAM F. KETTENBACH, et al.

Recorded Oct. 16, 1907, Book 1, p. 211.

The two Haevernick claims have been covered above, under the name of F. W. Kettenbach. Judge Dietrich finds there is no evidence of illegality of their entries (Vol. 1, p. 283).

The patent to Geary VanArtsdalen was dated November 1, 1904, and he conveyed direct to Clearwater Timber Company. It appears in his testimony that he had given an option to one Fitzgerald, and that this option was in some way taken over by Clearwater Timber Company and deed made direct to the company (Brown, Vol. 5. p. 1680 and VanArtsdalen Vol. 3, pp. 868-872). The testimony of Mr. E. N. Brown for Complainant (Vol. 5, pp. 1639-1683), as well as the testimony of F. J. Davies for Defendant (Vol. 10, pp. 3615-3625), shows the manner in which Clearwater Timber Company acquired properties was as follows: Mr. Brown (whose office for the company, and residence had been until about the middle of September, 1907, at Moscow, Latah County, Idaho, and whose office was thereafter, after having closed all purchases involved in this case, at Lewiston, Nez Perce County, Idaho), negotiated the purchase price with the vendors, and having done so required them to procure an abstract of title and execute a deed to the timber company and place the abstract and the deed in such bank as they might

choose at Lewiston. On advice to Mr. Brown that the deed and the abstract had been placed in the bank, he would go to the bank and draw a draft on Mr. Davies to pay the purchase price, and the deed and abstract, and draft would be sent forward by the bank to its correspondent bank in Spokane, where Mr. Davies resided, with the understanding that Mr. Davies was to have an opportunity to examine the abstract and deed, and if he found them satisfactory, he would pay the draft and forward the deed for recording and the abstract for continuation. Mr. Davies paid these drafts by giving a draft on the company in St. Paul, which he would hand to the bank in Spokane holding the deed and draft on him for collection. On receipt of draft on St. Paul, the Spokane bank would hand him the draft from Lewiston stamped "paid." The drafts referred to and correspondence with reference to each one of these sales were offered in evidence during the testimony of Mr.Davies and appear in Vol.11, pps. 4194-4202 & 4156-4158. The evidence shows that Mr. Davies was not acquainted with the people in Lewiston, and he had only been here between trains, or something like that, once or twice. The evidence further shows that the President and Secretary, and Assistant Secretary of Clearwater Timber Company

resided in St. Paul, Minnesota, and they had nothing to do with these transactions, and had no knowledge of the people here, or the conditions here, and that none of them except the President had ever visited here, and he only once or twice, staying not longer than a few hours. No correspondence ordinarily passed between Mr. Brown and Mr. Davies in closing these deals, unless Mr. Davies should write Mr. Brown requesting him to call the vendor's attention to some defect in an instrument in the title. Nothing in connection with any of the purchases for consideration passed through other than Mr. Brown or Mr. Davies. Estimators preceded the purchase through the timber, estimating the timber, but they were estimating timber only, according to Government surveys, and did not know anything about titles or ownership and did not know what, if any part, of the land on which they turned in estimates would be bought or negotiated for. At the time of these purchases Mr. Brown did not know Geary VanArtsdalen, knew simply of such people as the Haevernicks, had no acquaintance with Pearl Washburn, and purchased from the second grantee from her in the chain of title; and while he knew of Benton, he did not know the relations between W. F. Kettenbach and the Bentons, and did not know of two Ben-

tons. Reference has already been made to the William Haevernick property in connection with the Haevernick titles which passed first to F. W. Kettenbach, and later from him to Clearwater Timber Company. Neither Kester, W .F. Kettenbach, Robnett, Dwyer, nor any of them having any contact whatever with the transaction, or any interest in or knowledge thereof. Mr. F. W. Kettenbach, as shown above, had nothing to do with any of these timber transactions of Kester, W. F. Kettenbach, Robnett or Dwyer in any way whatsoever, and the connection of F. W .Kettenbach with a transaction would not carry any indication of any connection of W. F. Kettenbach, Kester, Dwyer, or Robnett therewith.

The Pearl Washburn claim was deeded by her first to McGrane, and then by McGrane to Chapman, and then by Chapman to Clearwater Timber Company. Judge Dietrich finds little if any evidence of illegality of this entry (Vol. 1, p. 296). Certainly there is nothing in the chain of title, or in the circumstances that would lead the purchaser from Chapman, whose title came from McGrane, to believe that there was anything wrong with the title. Mr. Brown testified that he was never aware of the chain of title, did not look at or examine the abstract in any manner whatsoever, so nothing that might have appeared in the

chain of these titles is shown to have come to his attention. He testified that it did not come to his attention. Mr. Davies, who examined the titles in Spokane, Washington, had so little knowledge of things in this vicinity that nothing that he may have seen in any of these abstracts would have been sufficient to have put him upon inquiry.

The two Benton claims passed first by conveyance to C. W. Robnett in 1902. Robnett then mortgaged them for $3,000.00 to O. E. Guernsey, who was then making mortgage loans in this vicinity. After that Robnett conveyed to Elizabeth White, the deeds to her being recorded July 8, 1907. There is nothing to show that Guernsey was not an innocent purchaser as mortgagee, the payment in advance of value rais ing the presumption of bona fides. There is nothing to show to a stranger examining the title that Elizabeth White was not a bona fide purchaser, and thereafter by deed dated September 4, and recorded September 18, 1907, she conveyed to Clearwater Timber Company. The Government makes prominent in the examination of Mr. Brown the fact that William F. Kettenbach represented Elizabeth White in the sale of these claims to the timber company. Her husband was dead, William F. Kettenbach was her son-in-law, and it appears in this testimony he looked

after this and other business for her generally. Mr. Brown testifies that he understood during the negotiation that the property was being bought from Elizabeth White, that W. F. Kettenbach was acting for her, and that the deed the bank forwarded was a deed from her. Mr. Brown was, just about that time, moving from Moscow to Lewiston. We feel confident that there was nothing about those circumstances that should have put Mr. Brown upon inquiry, or made him suspicious. He testified that he had no knowledge of illegality, and no notice of any illegality inherent in any of these claims at the times of his purchasing. There is no testimony to contradict this. Patents had been issued a long time; the Government had not begun suit to set aside the patents; the company was not purchasing of any entryman, and no one other than Mr. Davies had knowledge on the part of the company of the chain of title or the names of the entrymen where purchases were not made from the entrymen direct. The $3,000.00 mortgage on the two Benton claims was released simultaneously with the closing of the same to the Clearwater Company. In the Court below the Government stated Clearwater Timber Company had refused to purchase the Benton claims unless title should come through some one else than Robnett.

also that "defendants" had knowledge of the arrangements between Robnett and the entrymen. There is no such evidence. (Dietrich, Judge, Vol. 1, p. 317.) The evidence concerning the Timber Company's acquisition of these titles is, Brown for Complainant (Vol. 5, pp. 1639-1683), Davies for Defendant (Vol. 10, pp. 3615-3625), VanArtsdalen (Vol. 3, pp. 868-872). Judge Dietrich disposed of the W. B. Benton claim (Vol. 1, pp 290-293) and Joel H. Benton claim (Vol. 1, pp. 316-318.

It seems to counsel for this defendant that there are two circumstances in the record which may have misled counsel for the Government into making the statement that Clearwater Timber Company is chargeable with notice. In the direct examination of Mr. Brown by the Government, he testified to having seen at one time, either in the newspaper or otherwise, some notice of a charge having been brought by the Government against the validity of these titles. On cross-examination it appeared that this matter was the Lis Pendens of the commencement of one of these suits. This being the case, we know that the Lis Pendens was after the completion of the purchase of these titles, and therefore the notice was not effective. The company had become a bona fide purchaser before that. On cross-examination, Mr. Brown with reference to this was asked:

"Q. I will ask you to state whether that was before or after the company had acquired these titles and paid the purchase money.

A. That was after we had acquired the land."

(Vol. 5, p. 1680, bottom of page.)

Another circumstance which may have misled counsel for the Government, and it appears from his brief to mislead him, into the belief that Clearwater Timber Company was chargeable with notice, are the circumstances surrounding the claim of one Soren Hanson. A deed from Soren Hanson to Clearwater Timber Company went of record; it appears clearly from the testimony of Soren Hanson (Vol. 2, pp. 512-527) and W. F. Kettenbach (Vol. 5, pp. 1689-1694) and E. N .Brown (Vol. 5, pp. 1639-1643 and 1663-1670) that the Clearwater Timber Company had nothing to do with the execution and placing of record of this deed; that it was delivered by Hanson, and placed of record by Kettenbach without the knowledge of Clearwater Timber Company, and without their consent; that they had not bought the land, never paid anything for it, and have always disclaimed any interest in the land, and have not paid the taxes on it; and are willing that the owner of it, whoever the owner is, should have it. Mr. W. F. Kettenbach applied to the Clearwater Timber Company for quit claim deed to him for this

land, which was placed in its name under the circumstances aforesaid. The company's officials in St. Paul executed a quit claim, and mailed it to their attorney, the present attorney for the defendant in this case, with instructions that he should inquire into the circumstances and see whether it was proper to deliver the deed to Kettenbach. The attorney was still holding the deed for information at the time Soren Hanson testified in this case, and when Mr. Brown testified shortly thereafter, the attorney produced the deed for information of the court in this case, and let it be read in the record, also the letter of instructions which he received, and made the statement he still had the deed under advisement and he had come to the conclusion from the testimony heard in the case that it should not be delivered to Mr. Kettenbach. This statement was made during the testimony of Mr. Brown, not for the reason that the attorney had passed upon the title as between Mr. Kettenbach and Mr. Hanson, but for the reason that there was sufficient controversy and uncertainty about the matter, the company never having taken any action in the matter, should not do so, and should leave it for the parties in interest, whoever they are, to settle it either between them-

selves or by some adjudication in which all parties are brought in.

It appears that Mr. Kettenbach or Mr. Hanson, or both of them, attempted to sell this claim to the Clearwater Timber Company through Mr. Brown, and that Mr. Brown was adivsed by Mr. Kettenbach or otherwise, that the Government had already begun a suit to set the patent aside, and that a Lis Pendens had been filed. Mr. Kettenbach seemed to think the title was sufficiently good that it could be bought by the company without regard to the suit and the Lis Pendens. It seems Mr. Kettenbach was putting up to Mr. Brown at the same time some other titles on which suit and Lis Pendens was pending. Mr. Brown having asked the attorney whether the company could purchase the title on which were pending suit and Lis Pendens and being advised in the negative, turned them down.

The Governments brief at page 56 states there was an "arrangement" to sell the Hanson claim to the Clearwater Timber Company. There is no such evidence.

The fact that suit was pending and Lis Pendens pending against this claim at the time it was brought to Mr. Brown's attention shows that it was not brought to his attention until after the purchase of

all the claims which the Clearwater Timber Company has acquired in this case had been closed; so that whatever notice Mr. Brown had got in connection with this Soren Hanson and other claims, that the Government was litigating, it was long after the date of purchase of title to these claims, all of which it had previously acquired. The Government also points to the fact that in the Spring or Summer of 1907 Mr. Brown testified for the Government as a witness at Moscow in the trial for conspiracy, of the land conspiracy case in the United States District Court against W. F. Kettenbach, George H. Kester, and others. Mr. Brown's testimony shows that in that connection he was brought right in as a witness from the woods and put upon the stand, and identified a map of a timber fire protective association which showed boundaries but did not show any individual ownership, and after having identified the map he was taken from the stand and returned immediately to the woods. The only conspiracy indictments pending were Nos. 637, 635, 605, 617, 618 and 615, none of which mention any of the entries which were acquired by Clearwater Timber Company, nor were any of these entrymen's names endorsed on these indictments as witnesses when they were returned. From the examination of Mr. Brown made

in that case, nothing in connection with his testifying in that case would bring to his attention anything disclosed in the indictments, or anything concerning the issues in the case. Of course Mr. Brown does not know whether the case he was testifying in was a conspiracy case or not. The counsel for the Government so intimated in his examination of Mr. Brown. The titles he acquired after that date were the Haevernick titles, bought from F. W. Kettenbach, which were not referred to in any way in any of the criminal cases; the Pearl Washburn title, which passed to McGrane, from McGrane to Chapman, and from Chapman by deed dated June 7, 1907, which may have been prior to the time Mr. Brown testified; and the title which he purchased from Elizabeth White in September, 1907. Her name had not in any way figured in any of the criminal trials, and Mr. Brown did not know from whom her title was derived, or if he had known these titles were not mentioned in the conspiracy indictment, nor were the names of these entrymen endorsed as witnesses on the conspiracy indictments returned. As we shall find hereafter on reference to the authorities, it is not necessary for one, to establish his bona fides in purchasing property, to presume fraud, or to be suspicious, or to surmise things. He is only required to

know fraud when he sees it plainly enough to establish it to the mind of a person of ordinary intelligence who is not looking for fraud, and presumes as every one has a right to presume that transactions are bona fide until the contrary is brought to his knowledge. The purchaser who does not purchase in good faith purchases with knowledge, and with a guilty conscience, and mala fide—otherwise than in the ordinary course of business. In the ordinary course of business people presume no fraud unless it is brought to their attention. This great record of testimony and documents in this case clearly shows that Clearwater Timber Company has not been in any sense whatsoever a participant in the slightest degree in any unlawful conduct in the acquisition of timber lands and could not have acquired its vast acreage by dishonest principles or methods, for fraud is necessarily hidden and secret, and must be confined to smaller transactions and dealings.

V.

IDAHO TRUST COMPANY, AND LEWISTON NATIONAL BANK.

Lewiston National Bank acquired title to the claims of Van D. Robertson, September 29, 1904, Drury N. Gammon, October 9, 1903, and Robert O. Waldman, October 25, 1907.

These were acquired in payment of prior existing indebtedness to the bank. The Robertson and Gammon claims were acquired long prior to the time F. W. Kettenbach became president, and Edward C. Smith became cashier of the bank, succeeding W. F. Kettenbach and George H. Kester, who theretofore had been president and cashier. On the acquisition of the Robertson and Gammon claims in 1904, the bank was necessarily chargeable with notice of any knowledge which any of the officials in the bank participating in the transactions had where such officials had no private interests of their own, and were acting in the interests of the bank only. Robnett conveyed the Gammon claim to the bank, and of course the bank could not be chargeable with any knowledge which he had for the reason he was the other party to the transaction, and was not representing the bank in the transaction. If these claims should have to stand or fall, so far as the bank is

concerned, upon the issues between the Government and the entrymen, which has already been discussed in Mr. Tannahill's brief, counsel assumes that the claims will have to be held valid, because the entrymen undoubtedly testified as substantially, if not quite all of the entrymen, that there was no prior agreement, express or implied, for the sale of the claims. This testimony was also corroborated by W.F. Kettenbach, and George H. Kester: such being the case it is immaterial what Robnett may have testified, even if he were in no way impeached in the record, because the entryman's statement is just as good as his, and added to that is the testimony of Kester and Kettenbach. A record in such a condition under the rule of evidence requiring a case to be made made out clearly and satisfactory beyond a reasonable doubt, it is respectfully submitted there is no possibility for complainant to secure a decision in its favor. Judge Dietrich finds no evidence sufficient to justify cancellation of the Robertson patent (Vol. 1, pp. 302-303) and the bank's title to the Gammon claim (Vol. 1, pp. 304-305.

The other claim to which the bank secured absolute title, is the claim of Robert O. Waldman, deed for which was secured October 25th, and recorded October 26, 1907. The Government's first complaint

to set aside patents was filed October 14, 1907, and Lis Pendens immediately after, and this suit and Lis Pendens did not include the Waldman claim. It stood therefore entirely clear of record. The Government had filed its suit, attacking a very large number of entries, and it omitted this and many others, which was to all intents and purposes a clearance of all claims not included in the suit. Certainly the general public dealing in lands would have a right so to consider. The suit which was filed October 14 had been filed after very great delay, and would give, and did give, the impression that it was the deliberate and complete and final action of the Government in the premises. The Waldman claim was not attacked by the Government until after September, 1909, on which date No. 406 was begun, and by amendment subsequently the Waldman claim was inserted. Meanwhile the Lewiston National Bank, relying upon the Government patent so long of record unquestioned, and still unquestioned after more than two years from the returning of the first indictment in connection with these frauds, unquestioned in the first civil suit filed, attacking fifty-four entries in connection with these frauds, the title to the Waldman claims was taken over for the bank by F. W. Kettenbach, the new president, who, as it ap-

pears in the earlier portion of this brief, had nothing to do with any of these land transactions. Judge Dietrich having invalidated the bank's claim to this entry, the amount involved was too small to justify an appeal. (Vol. 1, pp. 288-290).

In addition to the foregoing claims to which the said bank took absolute title an absolute deed was made by William F. Kettenbach and George H. Kester to the Idaho Trust Company July 6, 1907, the same being made, however, only for the purpose of securing indebtedness to the Idaho Trust Company and Lewiston National Bank, then or theretofore existing, or which might thereafter be incurred, and on the 23rd day of July, an instrument was executed reciting that the execution of the said absolute deed had been made for the purpose of securing the indebtedness as aforesaid only. (Vol. 5, pp. 1927-1932). The indebtedness secured by said deed and instrument accompanying same with accumulations to the filing of the answer, viz: December 6, 1909, are as follows:

LEWISTON NATIONAL BANK

A. Indebtedness of George H. Kester.

(1) $20,000.00 and interest existing at the date of said deed.

(2) $8,000.00 and interest existing at said

date, the liability therefor being as guarantor of indebtedness of Naylor and Norlin.

B. Indebtedness of William F. Kettenbach.

(1) $2,000.00, with interest from December 20, 1908.
(2) $10,000.00, with interest from March 9, 1909.

IDAHO TRUST COMPANY.

A. Indebtedness of George H. Kester.

(1) $10,511.87, with interest from September 30, 1909.
$20,000.00 advanced to George H. Kester at $0,000.00 advanced to George H. Kester at the time of the execution by himself and Kettenbach to Idaho Trust Company of said absolute deed and instrument declaring that same was made to secure the payment of money only. (Vol. 9, pp. 3547).
(3) $5,000.00, with interest on account of a loan that had been made to George H. Kester upon the execution of said absolute deed.

B. Indebtedness of William F. Kettenbach.

(1) $4579.00, with interest from October 13, 1909.
(2) $7,929.00, with interest from May 13, 1909.

Since the filing of said answer. the notes held at the time of the filing thereof had been renewed and extended from time to time, and possibly other indebtedness incurred by the said Kester and William F. Kettenbach, all of wihch is secured b ysaid ab-

solute deed and instrument accompanying same, all of which, together with the indebtedness of said William F. Kettenbach and George H. Kester to said bank and trust company as above set forth at all different dates from and including the dates of the deed and trust instrument, is shown in the testimony of F. W. Kettenbach, (Vol. 9, pp. 3545 to Vol. 10, pp. 3659 and 3683). The same matter is also covered in the testimony of Edward C. Smith, secretary of the Idaho Trust Company, and cashier of the Lewiston National Bank, (Vol. 5, pp. 1889, 1948, Vol. 6, pp. 2016-2039), and the testimony of William F. Kettenbach and George H. Kester and William Dwyer. (Exhibits touching same touching notes and lists of renewals Vol. 11, pp. 4184-4192).

The said absolute deed and instrument accompanying same was taken by F. W. Kettenbach after he became president of the Lewiston National Bank, while George H. eKster and William F. Kettenbach were not representing the bank, and were representing themselves only, and were adversary parties to the bank in the transaction. The knowledge of William F. Kettenbach and George H. Kester at that time would not be chargeable to the bank. The first suit had not been begun to set aside patents for any of the property included in the deed, and the long

time expiring since the first indictments returned by the Government, gave color to the fact that the Government had practically abandoned its prosecutions and certainly that it was not hoping to recover the land. F. W. Kettenbach testified that from the investigations that he had made touching the matter, he did not believe that the entries were fraudulent; that any of the criminal prosecutions would succeed or that the Government would be able to set aside any of the patents.

In addition to the indebtedness of Kester and William F. Kettenbach as above set forth, the said bank, and trust company, also held the indebtedness of Kittie E. Dwyer, and William E. Dwyer, her husband, secured by absolute deed dated December 31, 1908, made to Idaho Trust Company, and an instrument setting forth that said deed was held to secure indebtedness then and theretofore existing to Kittie E. Dwyer and William Dwyer, her husband, and thereafter to be incurred by either of them to either said bank or said trust company. (Vol. 5, pp. 1935-1941). The indebtedness of said Kittie E. Dwyer and husband with accumulations to December 6, 1909, was as follows:

INDEBTEDNESS OF KITTIE DWYER AND HUSBAND TO LEWISTON NATIONAL BANK

(1) Note dated December 31, 1908, $14,056.00, and interest, the larger portion of this indebtedness existing since the 8th of July, 1907, on which date Kittie E. Dwyer and her husband executed a mortgage to said bank, to secure notes to the bank aggregating $12,500.00 which sum, with interest, is included in the above mentioned $14,056.00. (Vol. 9, pp. 3562-3567). This note for $14,056.00, was assigned to Idaho Trust Company and is referred to below under indebtedness to Idaho Trust Company.

Indebtedness of Kittie E. Dwyer, and William Dwyer, her husband, to Idaho Trust Company.

(1) Idaho Trust Company having taken assignment of note to Lewiston National Bank for $14,056.00 on October 13, 1909, said Kittie E. Dwyer and husband executed to Idaho Trust Company their note for $15,000.00 and interest, which included the amount due on said note for $14,056.00.

(1) On the same day Kittie E. Dwyer and husband executed another note for $3,450.00 and interest, representing a loan to them by said trust company.

Of this indebtedness of Kittie E. Dwyer and husband, $12,100.00 was secured on this land by mortgage recorded July 10, 1907, (Vol. 9, pp. 3562). This was renewed and extended and is now part of the debt secured by their absolute deed and trust agree-

ment to Idaho Trust Company. (Vol. 9, pp. 3564-3567). So the lien for that much and interest precedes the lis pendens.

This indebtedness of Kittie E. Dwyer and husband has been renewed from time to time, and possibly increased, all of which is shown by the testimony of F. W. Kettenbach, (Vol. 9, pp. 3545 and Vol. 10, pp. 3659-3683), above referred to.

VI.

AUTHORITIES ON THE SUBJECT OF BONA FIDE PURCHASE FOR VALUE WITHOUT NOTICE.

In United States v. Detroit Timber and Lumber Company, 26 Supreme Court Reporter 282; 200 U. S. 321; 50 Law Edition 499, Judge Brewer delivering the opinion of the Court said:

> "We do not understand the law to be as stated or that one who enters into an ordinary and reasonable contract for the purchase of property from another is bound to presume that the vendor is a wrong doer and that therefore he must make a searching inquiry as to the validity of the property. The rule of law in respect to purchases of land or timber is the same as that which obtains in other commercial transactions. . . . No one is bound to assume that the parties with whom he deals is a wrong-doer, and if he presents property the title to which is apparently valid and there are no circumstances disclosed which cast suspicion upon the title he may rightfully deal with him. . . Jones v. Simpson, 116 U. S. 609, 615; 29 Law Edition 742-744; 6 Sup. Ct. Rep. 538. *He is not bound* to make a searching examination of all the account books of the vendor, nor *hunt for something to cast suspicion upon the integrity of the title.* . . . As said by Strong, J., in Meehan v. Williams, 48 Pa. 238. What makes inquiry a duty is *such a visible state of things* as is inconsistent with a perfect right in him who proposes to sell."

In Sulthis v. McDougal et al. 170 Federal, 529, the Court of Appeals of the 8th Circuit, speaking unanimously through Amidon, District Judge, said:

"On the contrary, they took the very steps which would have been taken by a prudent business man to ascertain the state of the title. Instead of consumating the purchase, they suspended the transaction, and ordered an abstract. They had good reason to believe, that, if there was any outstanding instrument affecting the title to the property, the records would disclose the fact. The abstract showed the title to be clear. This was strong confirmation of what Berryhill had told them that the papers which he had executed were 'no good,' and were so regarded by the parties to whom they had been given. Upon this showing we are of the opinion that the McKays acted in good faith in accepting the deed and paying the purchase price. They exhausted the sources of information that had been disclosed to them, and what they discovered was such as would have led a man of reasonable prudence to believe that the title to the property was clear. 2 Pomeroy's Equity Jurisprudence, pp. 1008, note 1. The mere knowledge that papers had been previously executed which might affect the title to real property will not necessarily defeat the claim of a good-faith purchaser. In Stanley v. Schwalby, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960, the purchaser employed a counsel to examine the title. In the course of his investigation he learned as a fact that the land had been previously sold, but there being no conveyance of record, and the transaction being an old one, he reached the conclusion that the title of the

vendor was good, and so reported to his principal. The Supreme Court, though holding that the principal was charged with all the knowledge possessed by his agent, still decided that the vendee was entitled to the protection of a good-faith purchaser. Speaking to this question, it said:

'In order to charge a purchaser with notice of a prior unrecorded conveyance, he or his agent must either have knowledge of the conveyance, or at least of such circumstances as would by the exercise of ordinary diligence and judgment lead to that knowledge; and vague rumor *or suspicion*, is not a sufficient foundation upon which to charge a purchaser with knowledge of a title in a third person. Notice of a sale does not imply knowledge of an outstanding and unrecorded conveyance'

In the case of United States v. Detroit Lumber Co. 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499, the suspicious circumstances were much stronger than in the present case, but the Supreme Court refused to charge the purchaser with notice, using the following language:

'A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to Sugden on Vendors, pp. 622, where he says: 'In Ware v. Lord Egmont, 4 De Gex, M. & C. 460, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice,

unless the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining it was an act of gross or culpable negligence.'

See, also, the same case in this court, 131 Fed. 668, 674, 67 C. C. A. 1.

The position of the assignees of the McKays, however, is more favorable than their own. The evidence shows affirmatively that in October, 1906, the McKays executed an oil and gas lease of the property to Arthur B. Reese, under whom the other defendants claim. The rule is well settled that if Reese took without notice of plaintiff's lease, his title would be good though his vendor had such notice. Stanley v. Schwalby, 162 U. S. 255-283, 16 Sup. Ct. 754, 40 L. Ed. 960. At the time Reese accepted his lease, he inquired of the McKays whether there was any outstanding claim against the property, and was told by them there was not . . . . . The evidence is clear that neither Reese nor his agent at the time he took his lease had any actual knowledge of what appeared upon those records. Inasmuch as he was under no legal duty to search at the agency, his ineffectual effort to ascertain the state of its files certainly cannot place him in the same position as he would have occupied if he had obtained actual knowledge of the lease.

> From a careful examination of the evidence we are of the opinion that the defendants are entitled to the protection of good-faith purchasers as against complainant's lease. The decree, therefore, of the trial court was right, and it is affirmed."

The doctrine of bona fide purchaser for value without notice is only applicable at common law, to negotiable instruments, real property and sales in market. In the commerce of negotiable paper, the question of notice and duty of inquiry and bona fides have been more fully discussed by the courts, and illustrated than elsewhere. In Heard v. Dubuque County Bank, 8 Nebr. 10; 30 Am. Rep. 813, the Court said:

> "In Magee v. Badger, 34 N. Y. 247, Porter, J., says: 'The purchaser is not bound at his peril to be upon the alert for circumstances which might probably excite the suspicions of wary vigilance. He does not owe the party who puts negotiable paper afloat the debt of active inquiry to avert the imputation of bad faith."

Defenses to Commercial Paper, Joyce, page 596.

"Sec. 475. Notice of Knowledge—Suspicious circumstances—Gross negligence—Bad faith. Merely suspicious circumstances or carelessness are insufficient to necessitate inquiry and prevent a person from being a bona fide holder, nor is mere suspicion evidence of negligence which will defeat a right to

receiver as a bona fide holder. So under a California decision such suspicion is insufficient without circumstances creating a presumption that facts impeaching the validity of the paper where known by the holder. And in Connecticut it is held that the holder of negotiable paper is not put upon inquiry by knowledge of facts which, although capable of supporting a suspicion of some unknown defect, are fully consistent with a valid title in the vendor. So under other decisions the acts of the holder in failing to make inquiry must have amounted to bad faith to preclude recovery. And even gross negligence without bad faith is insufficient. But if the acts of the holder in obtaining the paper constitute bad faith he will not be entitled to protection as a bona fide holder. *It may therefore be stated as a rule that suspicious circumstances alone, even though sufficient to put an ordinarily prudent man on inquiry will not, in the absence of bad faith, or a wilful disregard of the facts showing an infirmity in the paper, destroy the title of a taker of negotiable paper as that of a bona fide holder.*

476. Same subject—Decisions.—In a case in the United States Supreme Court, where an accepted and indorsed bill of exchange was placed by the drawer as collateral security for his own debt in the

hands of his creditor, and the latter sued the acceptor, an instruction was held erroneous, "that if such facts and circumstances were known to the plaintiff as caused him to suspect or that would have caused one of ordinary prudence to suspect, that the drawer had no interest in the bill, and no authority to use same for his own benefit, and by ordinary diligence he could have ascertained these facts," then the jury should find for the defendant.

41 Goodman v. Simonds, 20 How. (61 U. S.) 343, 15 L. Ed. 934. . . Lytle v. Lansing, 147 U. S. 59, 71, 37 L. Ed. 78. . . King v. Doane, 139 U. S. 166, 173, 35 L. Ed. 84, 11 Sup. Ct. 465. Montclair v. Ramsdell, 107 U. S. 147, 158, 27 L. Ed. 431, 2 Sup. Ct. 391. . . . Swift v. Smith, 102 U. S. 442, 444, 26 L. Ed. 193 (to the point that where mercantile paper is not due and there is nothing upon it or in the indorsement to show want of good faith the purchaser of such paper from one apparently the owner, who gives consideration, *obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect ,that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts.* "He can lose his

right only by actual knowledge or bad faith.. It is true that if the bill or note be so marked on its face as to show that it belongs to some other person than the one who offers to negotiate it, the purchaser will be presumed to have knowledge of the true owner and his purchase will not be bona fide.") ; Brooklin City & Newton R. Co. v. National Bank of the Republic, 102 U. S. 14, 38, 41, 26 L. Ed. 61. In concurring opinion:

"Possession of such an instrument before maturity, if indorsed in blank and payable to bearer, is prima facie evidence that the holder is the owner and lawful possessor of the same; and nothing short of proof that he had knowledge, at the time he took it, of the facts which impeach the title as between antecedent parties, not even gross negligence if unattended with mala fides, is sufficient to overcome the effect of that evidence, or to invalidate the title of the holder supported by that presumtion." . . . Perris Irrigation District v. Thompson, 116 Fed. 832, 834, 54 C. C. A. 336, 341, in error, dismissed for want of jurisdiction, 196 U. S. 637 (bona fide holder of bonds of Irrigation district; cited to point. "*It was not enough that the circumstances might have been such as to create suspicion in the mind of one ordinarily prudent.*. In order to render the trans-

action invalid, facts must have come to the notice of the defendant in error or his agent of such a nature that to refrain from pursuing further inquiry would of itself amount to evidence of *bad faith.*") . . . (476 continued.) So in New York it is declared in a recent case that mere surmise or suspicion is no longer sufficient to put a purchaser of negotiable upon inquiry; the facts necessary to cause such inquiry must be such as to *show dishonesty or bad faith* on his part in refraining from making the inquiry, and that this rule applies to negotiable bonds and coupons held by one who derived his title through a holder in due course, who is an innocent purchaser for value not affected as a party to any fraud or illegality in the paper. Hibbs vs. Brown, 98 N. Y. Supp. 353. And in another case in that state the rule that suspicion of defect of title, or the knowledge of circumstances such as would excite suspicion in the mind of a prudent man or gross negligence on the part of a taker at the time of the transfer, will not defeat his title, as such a result can only be produced by bad faith on his part, and that the question is one of honesty or dishonesty and that guilty knowledge and wilful ignorance involve the result of bad faith, and fraud established is fatal to the title, applies to negotiable securities,

and this is declared to be settled law in New York.

48 Perth Amboy Mut. Loan H. & B. Assn v. Chapman, 81 N. Y. Supp. 38, 80 App. Div. 556, aff'd (mem.) 178 N. Y. 558, 70 N. E. 1108.

A.

There are certain features of this case of special interest and significance in connection with the relation between the Government and third persons who have acquired interests in these lands through and under the entrymen. After the tedious formality, notices to the public, and hearings, the Government issued its final certificate, based on testimony taken after notice given, certifying that entrymen had a right to patent, and later issued the patent, one of the most solemn acts done by the Government in the administration of its affairs. The Government's right to cancel a final certificate as against a bona fide purchaser prior to patent, was challenged by one of the ablest opinions written by any of the attorneys general of the United States—that of Caleb Cushing, Atty. Gen. 7 Opinion, 657. This able opinion has not been followed in the Land Department—though it would have been more to the credit of the Government perhaps if it had been, and the

influence of the Government's example would have been beneficial in the education of the people, and would doubtless have caused them to be more insistent on punishment in criminal courts whenever fraud was committed upon the Government. The principles of that opinion always were and still are dominant in the courts in those matters.

We are now dealing, however, not with a final certificate, but with a patent which the Government sent forth with all solemnity and credit possible to be attached to any document, intending that the public should rely upon it. It is akin commercially to the confidence which is attached, or which should be attached to commercial paper, and it is known that it circulates as freely and as speedily as long as it is outstanding. It is not the purpose to contend here against the right of the Government to set aside a patent for fraud in the hands of anyone who has acquired the title with guilty knowledge. The only contention here urged is that the Government be held to the same rules of action when it seeks relief from fraud which is required from a private individual whenever it is sought to interfere with the rights of third parties who have acquired an interest in the property without knowledge of the

fraud. In United States v. Detroit Lumber Company, supra, the Court says:

> "Any person who deals with such entrymen, —relying upon the evidence of his entry, which are in all respects in good form and sufficient, and are an acknowledgement by Government officials of a rightful entry—*is justly entitled to the consideration of a court of equity,* much more so where it is a patentee."

As declared in that case, the Government stands in a court of equity subject to the rules and obligations of equity in good conscience the same as an individual. This doctrine has been declared in a number of Federal cases, as follows:

In the United States v. Stinson, 25 Sup. Ct. Rep. pp. 426, the Court, speaking unanimously through Brewer, Justice, said:

> "The Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual."

The case last mentioned affirmed the opinion in the same case in the Court of Appeals which was delivered by Grosscup, Judge, and in which, at 125 Fed. 910, he said:

> "When the Government seeks its rights at the hands of a court, equity requires that the rights of others as well, should be protected. Parr v. United States, 98 U. S. 438; 25 L. Ed. 209 . . .

The substantial considerations underlying the doctrine of estoppel apply to Government as well as to individuals. Chope v. Detroit Plank Road Co., 47 Mich. 195; 26 Am. Rep. 512. Commonwealth v. Andre, 3 Pick., 224."

In Walker v. United States, 139 Fed., 409, Jones, Judge, delivering the opinion of the Court, said:

"While underying principle of all the decisions is that when the sovereign comes into court—the Court has authority and is under duty to withhold relief from the sovereign except upon terms which do justice to the citizen or subject as determined by the jurisprudence of the forum in like subject-matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States . . . may in a particular case work an estoppel against the Government."

Citing: Lindsay v. Hawes, 2 Black, 560; 17 L. Ed., 265.

U. S. v. Bank of Metropolis, 15 Pet. 392; 10 L. Ed. 774.

Davis v. Gray, 16 Wall, 203; 2 L. Ed., 447.

Sinking Fund cases, 99 U. S., 719; 25 L. Ed. 496.

U. S. v. Parker, 12 Wheat, 559; 6 L. Ed. 728.

Cooks v. U. S., 91 U. S., 398; 23 L. Ed. 237.

Duvall v. U. S., 27 Ct. Cl., 60.

Hartson v. U. S., Ct. Cl., 456.

"The principle that the sovereign is bound by his own acts . . . is a wholesome one and requires the Courts to visit an estoppel upon the

sovereign in a particular case where he invokes judicial action."

If a private individual issue a certificate of corporate stock, a warehouse receipt, or a bill of lading, bearing his endorsement in blank, and places it in the hands of his agent with instructions which are disregarded by the agent, the individual cannot question the title which may be secured by any innocent purchaser dealing with the agent. This is true not because the document was negotiable, but on the grounds of estoppel, on the principle that one who has placed it in the hands of a third person to injure another shall make good the injury which has been done. Has not the United States, by leaving these patents stand of record for years after the time they saw fit to indict parties criminally in connection with the alleged frauds, been as guilty of holding out to the public muniments of title in respect of which they might deal as the party who sends forward his agent with bill of lading, warehouse receipt, and certificates of stock endorsed in blank?

If a private individual, having knowledge enough to swear out a warrant for criminal arrest in connection with fraudulent acquisition of property should nevertheless leave the title to the property standing upon the public records from two to three

years, or more years thereafter without any lis pendens, would not he in a court of equity be charged with laches which would prevent him from attacking the title of any person who may have acquired an interest therein free from guilt? Would it lie in the mouth of a person allowing the title to stand open of record in that way to charge persons acquiring an interest therein with negligence? Has not the very issuance of such muniments of title dealing and to deal in such lands with a confidence which invited and induced the public to extend confidence silence precautions of every kind.

I have no doubt that between private individuals, a Court of Equity would promptly dismiss a complainant standing in such a position. If there had been circumstances sufficient in this case to create the duty to make inquiry on the part of the bank and trust company, what inquiry could have been made, and what would have been the result of the same? If they had sought out the entrymen they would have told them as they have testified, that they had no prior agreement to sell their claims, and that their entries were made bona fide for their own use. Receiving this information they would have been justified in going ahead and taking the mortgages which they took. The verdict of acquittal in

the criminal cases affirmed this. Had they made the inquiry, they could have had no knowledge of illegality; the information they would have secured would have negatived such. Concerning such a situation in 23 American and English Encyclopedia of Law, second edition, page 514 ,it is said:

> "(8) Discharge of Duty to Make Inquiry—
>
> (a) FAILURE TO DISCOVER ADVERSE RIGHTS.—Where a purchaser, having been put upon inquiry ,exercises due diligence by following the line of inquiry suggested, and either fails to discover the existence of any adverse rights, or becomes satisfied that his suspicions were unwarranted, or that some change in the circumstances had obviated the grounds of his apprehension, he will not be chargeable with notice. Thus, where a purchaser having information that a person other than the vendor is in possession of the land, exercises due diligence in investigating the nature of the occupant's possession, and fails to gain knowledge of the possessor's rights, the notice afforded by the possession cannot be asserted against him. Likewise, where a purchaser is put upon inquiry by the circumstances that a tenant is in possession of the land, and after making due inquiry fails to discover the fact and circumstances of the tenancy, he will not be chargeable with notice of the landlord's title."

F. W. Kettenbach testified practically to having made the inquiry and received information in favor of the validity of claims on which he must rely, as declared in the authority just quoted. The verdict

of acquittal in the criminal case corroborates his report of the result of the inquiries he made and Judge Dietrich's decision adds to the corroboration, in fact, confirms the position taken by F. W. Kettenbach in his testimony. Smith vol. 6 pp. 3025-2026 and Kettenbach Vol. 10, 3602-3603.

There were no circumstances brought to the notice of Mr. Brown, or Mr. Davies, pertaining to the titles they were acquiring for Clearwater Timber Company, which would arouse any question in their minds with reference to the titles, much less create even any suspicions, and they come clearly within the doctrine in the case of United States v. Detroit Lumber oCmpany, that where there is nothing to excite question and inquiry, it is not necessary for them to hesitate for the purpose of conjuring up hypothetical questions of illegality to be investigated.

With substantially all the claims valid as found by Judge Dietrich, how can it be said that a purchaser was negligent even, to say nothing of showing want of good faith, where he used caution and discrimination as F. W. Kettenbach testifies he did, in taking titles for the Bank and Trust Company for security only. Of the fourteen claims transferred to the Idaho Trust Company as security,

Judge Dietrich found only one, viz: that of Guy L. Wilson, illegal, and that the Trust Company was put upon inquiry, because, it was one of the claims involved in an indictment that had been tried, and the officers of the Trust company were so closely connected with parties involved in the case that it would be presumed they knew enough to be put upon inquiry. The value of the claim was not enough to justify an appeal by the company. A presumption, is a dangerous thing. It consists in "taking" a thing for granted without any proof of ~~therefore its~~ right to the grant.

It does not seem that, when only one claim out of fifteen, is bad, people should be precluded from purchasing any of the fifteen because of rumors of illegality, and certainly in such a case the Government should act quickly in asserting its right; more quickly, and with less misleading vacillation than it has done in this case.

Simply because there have been general vague public rumors of illegality so groundless as to be without basis about fifteen times to each single instance of verity, does not result in reducing the question of bona fide purchase, to a question whether there was illegality in fact since the question of bona fide purchase concedes the illegal-

ity and depends upon the bona fides of the purchaser. The fact that he was negligent, does not defeat his title nor does anything but *mala fides*.. Where a court below holds that there was no illegality in a title, a court above reverses the holding, there is so little foundation for the contention, that the good faith of the purchaser, in believing the title good, should not be any more subject to question than the good faith of the judge below in so deciding. The law gives a Lis Pendens, for protection of one claiming to have been defrauded and in case of alleged fraud a party is required to act at once on discovery of the fraud.

VII.

A purchase under a quit claim deed is not deprived of status of a bona fide purchaser.

Moelle vs. Sherwood, 148 U. S. 21; 37 L. ed. 350; 13 Sup. Ct. Rep. 426;

where the court said:

"The doctrine expressed in many cases, that the grantee in a quitclaim deed cannot be treated as a bona fide purchaser does not seem to rest upon any sound principle. It is asserted upon the assumption that the form of the instrument, —that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time,—indicates that there may be other and outstanding claims or interests which may possibly affect the title of the property; and therefore it is said that the grantee, in accepting a conveyance of that kind, cannot be a bona fide purchaser, and entitled to protection as such, and that he is in fact thus notified by his grantor that there may be some defect in his title, and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers. There may be many reasons why the holder of property may refuse to accompany his conveyance of it with an express warranty of the soundness of its title, or its freedom from the claims of others, or to execute a conveyance in such form as to imply a warranty of any kind, even when the title is known to be perfect. He may hold the property only as a trustee, or in a corporate or official character, and be unwilling, for that reason, to assume any personal responsibility as to its title

or freedom from liens, or he may be unwilling to do so from notions peculiar to himself; and the purchaser may be unable to secure a conveyance of the property desired in any other form than one of quitclaim ,or of a simple transfer of the grantor's interest. It would be unreasonable to hold that, for his inability to secure any other form of conveyance, he should be denied the position and character of a bona fide purchaser, however free, in fact, his conduct in the purchase may have been from any imputation of the want of good faith. In many parts of the country a quitclaim, or a simple conveyance of the grantor's interest, is the common form in which the transfer of real estate is made. A deed in that form is in such cases as effectual to divest and transfer a complete title as any other form of conveyance. There is in this country no difference, in their efficacy and operative force, between conveyances in the form of release and quitclaim, and those in the form of grant, bargain, and sale. If the grantor, in either case, at the time of the execution of his deed, possesses any claim to or interest in the property, it passes to the grantee. In the one case—that of bargain and sale—he impliedly asserts the possession of a claim to or interest in the property; for it is the property itself which he sells and undertakes to convey. In the other case, that of quitclaim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to or interest in the premises which he may posses, without asserting the ownership of either. If in either case the grantee takes the deed with notice of an outstanding conveyance of the premises from the grantor, or of the execution by him of obligations to make such conveyance of the premises,

or to create a lien thereon, he takes the property subject to the operation of such outstanding conveyance and obligations, and cannot claim protection against them as a bona fide purchaser. But in either case, if the grantee takes the deed without notice of such outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up would lead to a knowledge of such outstanding conveyance or equity, he is entitled to protection as a bona fide purchaser upon showing that the consideration stipulated has been paid, and that such consideration was a fair price for the claim or interest designated. The mere fact that in either case the conveyance is unaccompanied by any warranty of title, and against incumbrances or liens, does not raise a presumption of the want of bona fides on the part of the purchaser in the transaction. * * * * The character of bona fide purchaser must depend upon attending circumstances or proof as to the transaction, and does not arise as often, though, we think, inadvertently, said, either from the form of the conveyance, or the presence or the absence of any accompanying warranty."

A deed of the land instead of a pure quit claim of all interest in the land is not a quitclaim, such as is held to pass title subject to equities only.

U. S. vs. Cal. & O. Land Co., 13 Sup. Ct. Rep. 458;

Same vs. Dalles Military Road Co., id. 465.

Even in those places where the rule Appellant contends for exists, the exceptions and qualifications thereof nullify it in this case. When the purchaser

gets a warranty deed, a quitclaim in the prior chain of title is of no effect as notice.

23 Am. & Eng. Encyc. Law; 2nd Ed. p. 572.

VIII.

The authorities are much divided as to the sufficiency of prior indebtedness as a consideration to entitle one to protection as a bona fide purchaser, and any other equity in a particular case may turn the balance and we submit the peculiar equities in this case above set forth. To the extent there passed a present consideration there is protection under all the authorities, and where a present consideration passes in addition to a prior debt, protection should be given for a whole debt. The present advance of more money, receiving security for the newly incurred and prior debt, especially when the latter is a large amount is the equivalent of an extension of time, which according to all authority is sufficient.

24 Am. & Eng. Encyc. Law, 2nd Ed., 139-140.

IX.

Complainant entirely misconceives the relation to this case of the absolute deeds to Idaho Trust Co. to secure money. The authorities cited from England and Ala that absolute deeds to secure money are a "badge" of fraud are in conflict with most other decisions, and besides are cases involving creditors only and hold it a badge of fraud on creditors only. Here was no fraud because the transaction was recorded in the minute book of Idaho Trust Co. and could not be nor was it attempted to be concealed and it was evidenced by written contract which recited the deed was given to secure money. Vol. 5, p. 1925-26-33-34-37. A right of foreclosure would follow a default without any express provision therefor. The provision against sales without written consent and authority of mortgagors referred only to voluntary sales and in case of such filled the double purpose (a) of giving the grantee definite authority of the grantors for the disposition to be made of the property and (b) definitely closing out grantors right of redemption after the sales.

It is respectfully submitted that the decree below should be affirmed.

JAMES E. BABB,
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Solicitor for said Appellees.